

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 02-54406-JRG
SUTTER'S PLACE, INC.,
Debtor. Chapter 11

ORDER GRANTING CLASS CERTIFICATION

I. BACKGROUND

Debtor operates a card club in San Jose, California. Haim Avidor was employed by Debtor pre-petition as a card dealer from September 1994 to August 2002. While in Debtor's employ, Debtor had (and Debtor still maintains) a company-wide practice of charging its dealers a fixed amount of money per hour from the dealers, presumptively from the dealers' tips. The amount of money collected differs based on the type of dealers - Poker section, California section, and Panguine dealers each pay a different hourly amount. These funds were pooled together and purportedly redistributed to other types of employees.

Avidor alleges that this policy and practice is illegal and believes he is owed additional compensation under the California Labor

1 Code. By order dated November 24, 2004, this court permitted Avidor
2 to file a class proof of claim in this case. Avidor subsequently
3 filed three proofs of claim on behalf of the class he seeks to
4 represent -- all of the former and current dealers employed by Debtor
5 between August 8, 1998 and the present. One proof of claim seeks
6 damages for the period of up to four years before the petition date
7 (August 8, 1998 - August 8, 2002); the second proof of claim seeks a
8 priority claim for wages earned but not paid in the 90 days before the
9 petition date (May 10, 2002 - August 8, 2002); and the third proof of
10 claim seeks an administrative claim for post-petition wages due.
11 Avidor now moves for certification of the class over Debtor's
12 objection.

13 **II. LEGAL STANDARD**

14 Federal Rule of Civil Procedure 23 governs class actions and is
15 applicable to a contested proof of claim through Federal Rules of
16 Bankruptcy Procedure 7023 and 9014 at the court's discretion. A party
17 seeking class certification bears the burden of proof and must meet
18 each of the requirements of Rule 23(a) and at least one of the
19 requirements of Rule 23(b). The four basic requirements under Rule
20 23(a) are: (1) numerosity; (2) typicality; (3) commonality; and (4)
21 adequacy of representation. Rule 23(b)(2) permits a class action to
22 provide injunctive relief where the defendant has acted with respect
23 to the class as a whole. Rule 23(b)(3) permits a class action if the
24 questions of law or fact common to the members predominate over any
25 questions affecting only individual class members and a class action
26 is superior to other means available for the fair and efficient
27 adjudication of the controversy.

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1 **III. DISCUSSION**

2 Avidor seeks a single class certification for his three proofs
3 of claim under FRBP 7023. Debtor objects to the motion inter alia
4 that: (1) the tip pool is lawful; (2) Avidor has no standing to bring
5 an action under California Labor Code § 351; (3) Debtor can adjudicate
6 and proofs of claim filed by the dealers on an individual basis; and
7 (4) Avidor did not work for Debtor post-petition and cannot adequately
8 represent the class. After review of all the papers and consideration
9 of oral argument, the court finds Avidor meets all of the requirements
10 for class certification.

11 **A. Requirements of Rule 23(a)**

12 (1) Numerosity. Avidor asserts that there are over 428 potential
13 class members, so the proposed class is sufficiently numerous that
14 joinder of all parties is impracticable. Jordan v. Los Angeles
15 County, 669 F.2d 1311, 1319 n.10 (9th Cir. 1982), vacated on other
16 grounds, 459 U.S. 810 (1982).

17 (2) Typicality. Claims are "typical" "if they are reasonably co-
18 extensive with those of absent class members; they need not be
19 substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011,
20 1020 (9th Cir. 1998). Avidor's claims are typical because he
21 challenges the legality of the tip pool system. This challenge raises
22 common questions of fact and law amongst all of the class members and
23 those common questions predominate. Differences in the amount various
24 dealers contributed to the tip pool do not undermine commonality,
25 since the relief sought is against the same course of conduct by
26 Debtor. Likewise, the fact that Avidor has not worked for Debtor
27 post-petition does not undermine commonality because the tip pool
28 system has not changed pre- and post-petition.

1 (3) Commonality. In his proofs of claim, Avidor challenges the
2 legality of the tip pool system. This challenge raises common
3 questions of fact and law amongst all of the class members and the
4 common questions of law and fact predominate. Differences in the
5 amount various dealers contributed to the tip pool do not undermine
6 commonality, since the relief sought is against the same course of
7 conduct by Debtor.

8 (4) Adequacy of representation. Avidor and his counsel will
9 fairly and adequately protect the interests of the class since the
10 interests of Avidor are the same as the class -- proving the
11 illegality of the pooled tip scheme and obtain prospective injunctive
12 relief, restitution, and damages for past violations. Avidor can
13 represent the post-petition priority employees because this appears
14 to be a solvent case and all classes of creditors will be paid in full
15 from the estate. Further, Avidor's counsel has prosecuted a number
16 of class actions for employees including some involving other
17 California casinos and card clubs and has the financial and personnel
18 resources to prosecute this class claim.

19 Debtor asserts that Avidor has no standing to bring an action
20 under California Labor Code § 351 and thus class certification should
21 be denied. However, Debtor misstates the law. A court should not
22 address the class certification issue in the instance where a
23 plaintiff has not suffered an injury "directly arising from or
24 connected with the wrong alleged." 1 Alba Conte and Herbert B.
25 Newberg, Newberg on Class Actions § 3:19 (4th ed. 2002). That is not
26 the case here. Avidor alleges that Debtor took money from him and
27 other dealers for the allegedly illegal tip pool. Whether or not
28 Avidor has standing to pursue the alleged wrong under California Labor

1 Code § 351 does not preclude this court from certifying Avidor's
2 class.

3 **B. Requirements of Rule 23(b)(2)**

4 Avidor's proof of claim satisfies FRCP 23(b)(2) which permits a
5 class action to provide injunctive relief where the defendant has
6 acted with respect to the class as a whole. Here a major goal of the
7 proof of claim are to require Debtor to change or eliminate its
8 allegedly illegal pooled tip scheme. Debtor has refused to alter or
9 eliminate that practice and class certification is appropriate.

10 **C. Requirements of Rule 23(b)(3)**

11 Even if Avidor's proofs of claim did not satisfy Rule 23(b)(2),
12 they satisfy the requirements of Rule 23(b)(3). Matters to be
13 considered in applying Rule 23(b)(3) are: (1) the interest of members
14 of the class in individually controlling the prosecution or defense
15 of separate actions; (2) the extent and nature of any litigation
16 concerning the controversy already commenced by or against members of
17 the class; (3) the desirability or undesirability of concentrating the
18 litigation of the claims in the bankruptcy court; and (4) the
19 difficulties likely to be encountered in managing the class action.

20 Here common issues of law and fact predominate the litigation and
21 class resolution is superior to any other method of adjudicating this
22 controversy. First, adjudicating individual claims in this court or
23 before the labor commissioner is not superior because the claims are
24 novel and should be decided in one action. Moreover, injunctive
25 relief is not available before the labor commissioner and a trial in
26 front of the labor commissioner could result in a second trial in
27 state court. Also, there is no interest expressed by other class
28 members to control individually the prosecution of this action.

1 Second, the court is aware of no other actions pending against Debtor
2 related to this controversy. Third, it is desirable to have all of
3 these claims adjudicated in the bankruptcy court because moving these
4 matters to state court would delay Debtor from exiting bankruptcy
5 after settling with the City of San Jose. Finally, the court does not
6 anticipate any difficulties in managing the class because the class
7 size is relatively small, the amounts due are relatively small, and
8 there are no specialized issues requiring individual resolution or
9 other class difficulties.

10 Class certification is the superior method of resolving the
11 liability underlying the claim. Once liability is established,
12 determining the damages due each class member can be expeditiously and
13 effectively calculated. The amount of damages is based on the flat
14 amount charged each dealer, and the actual tips received by each
15 dealer is irrelevant.

16 IV. CONCLUSION

17 The main issue of dispute is whether the tip pool policy that has
18 been in place with respect to Debtor's card dealers is legal. Debtor
19 claims it is; Avidor claims it is not. That issue of fact and law is
20 common to all dealers and needs to be determined prior to the
21 determination of any proof of claim of the dealers against Debtor.
22 It is appropriate to determine that issue in one class action
23 proceeding rather than in numerous individual objection to claim
24 proceedings as requested by Debtor.

25 Avidor has meet his burden of proving that each of the
26 requirements of FRCP 23(a) has been met -- numerosity, typicality,
27 commonality, and adequacy of representation -- and also the

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UNITED STATES BANKRUPTCY COURT

For The Northern District Of California

1 requirements of FRCP 23(b)(2) and FRCP 23(b)(3). His class is
2 certified for all three proofs of claim.

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4 DATED: _____

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JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

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Case No. 02-54406

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CERTIFICATE OF MAILING

I, the undersigned, a regularly appointed and qualified Judicial Assistant in the office of the Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San Jose, California hereby certify:

That I, in the performance of my duties as such Judicial Assistant, served a copy of the Court's **ORDER GRANTING CLASS CERTIFICATION** by depositing it in the United States Mail, First Class, postage prepaid, at San Jose, California on the date shown below, in a sealed envelope addressed as listed below.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____ at San Jose, California.

LISA OLSEN

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